CONVERSION BY INNOCENT AGENTS

He who would attempt to define adequately in a few words the tort known to our law as a conversion would indeed be a bold man.[1] Probably no definition can be framed unless expressed in such general terms as to be of little use except to one who already knows the authorities. Be this as it may, a recent case serves to emphasize some of the difficulties of the subject. A possessor of negotiable instruments payable to bearer, which had been stolen from the plaintiff, delivered them to the defendants, who were bankers, and authorized their sale. The defendants sold them and paid over the proceeds to their principal—all without notice of the plaintiff's interest. It was held that the defendants' acts did not constitute a conversion. *Pratt v. Higginson* (1918, Mass.) 119 N. E. 662.[2]

In making its decision the Massachusetts court followed an earlier case in the same jurisdiction[3] and apparently was not aware that an opposite conclusion had been reached in at least one other state.[4] As cases upon the precise point involved are few in number and conflicting, it seems that the problem is in most jurisdictions an open one. Cases dealing with ordinary "tangible personal property"[5] are of course common enough. The view prevailing in most American jurisdictions undoubtedly is that "a person is guilty of a conversion who sells the property of another, without authority from the owner, notwithstanding he acts under the authority of one claiming to be the owner, and is ignorant of such person's want of title."[6] In England the question apparently has not been settled by the court of final authority,[7] but a decision of the Queen's Bench Division accords with

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allowed) in the note to the case of *Miller v. Edison Electric Illuminating Co.* in 3 L. R. A. (N. S.) 1061. Massachusetts has an interesting statute dealing with the subject. A construction of this statute will be found in *Smith v. Morse* (1889) 148 Mass. 407, 19 N. E. 393.

[1] "I am never very confident as to what is or is not a conversion." Bramwell, L. J., in *National Mercantile Bank v. Rymill* (1881) 44 L. T. (N. S.) 767.

[2] For complete statement of facts, see RECENT CASE NOTES, *infra.*

[3] *Spooner v. Holmes* (1869) 102 Mass. 503. In that case the defendant derived no profit from the sale; in the principal case the defendants were paid a commission. The court very properly refused to distinguish the cases on that ground.

[4] *Kimball v. Billings* (1867) 55 Me. 147.

[5] The word "property" here refers, of course, to the physical object owned. A discussion of the ambiguous use of this word will be found in the preceding Comment: *What is an "Injury" to "Real Property"?*

[6] Quoted from the opinion of the court in *Kimball v. Billings,* cited *supra,* note 4. For citation of cases taking the prevailing view, see the note in 50 L. R. A. (N. S.) 52.

[7] *Hollins v. Fowler* (1875) L. R. 7 H. L. 757, naturally comes to mind, but that case does not settle the question, for there the defendants—according to the findings of fact—purchased the goods as principals and then re-sold them.

the prevailing American view.[8] However, a decision of the Court of Appeal in an earlier case[9] seems hard to reconcile in principle with that view, and we may agree with the learned editor of the LAW QUARTERLY REVIEW that with the English authorities as they were some other judge of the Queen's Bench Division might have decided the *Consolidated Bank* case the other way.[10] In fact there are a few—very few, be it confessed—American cases which hold that the innocent agent[11] is not guilty of a conversion, even where the property sold is tangible personalty.[12] The question ultimately comes down to one of public policy, and there is much to be said in favor of the view taken by the minority. We may well agree with the editor of the LAW QUARTERLY REVIEW when in the note already quoted from he says: "It is submitted that in cases like the *Consolidated Company v. Curtis* reasons of public policy favour the auctioneer [the innocent agent] rather than the money lender [the true owner]."

Even if we admit that the view of the majority represents sound policy in the case of ordinary chattels, it will not do to hastily assume, as did the court in Maine in the case already cited,[13] that the same rule ought to apply to negotiable instruments payable to bearer. It is interesting to note that neither the Maine nor the Massachusetts court gave any adequate reason for its decision. As stated, the former merely applied without discussion the rule settled for ordinary chattels and did not notice the possibility of a difference. The latter, while it recognized the distinction, contented itself with saying that the case before it differed from that of ordinary chattels in that "title passed by delivery of the instruments" to the holder in due course. The fact that the purchaser is protected does not, of course, of itself, settle whether the innocent agent is also protected. Perhaps the same considerations of public policy which lead us to give protection to the holder in due course who buys from the thief negotiable paper payable

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[8] *Consolidated Company v. Curtis & Son* [1892] 1 Q. B. 495.

[9] *National Bank v. Rymill* (1881, C. A.) 44 L. T. (N. S.) 767. This important case is apparently not elsewhere reported. It seems clearly opposed in its views of what constitutes a conversion to the earlier case of *Stephens v. Elwall* (1815 K. B.) 4 M. & S. 259, but doubtless is distinguishable from *Consolidated Company v. Curtis & Son,* cited in the preceding note.

[10] (1892) 8 L. QUART. REV. 114 and 183.

[11] The term "innocent agent" has been used in this Comment to denote an agent who sells chattels or negotiable paper entrusted to him by a principal without notice, actual or constructive, of the claims of the true owner.

[12] *A. J. Roach & Co. v. Turk and Hawkins* (1872, Tenn.) 9 Heisk. 704; *J. T. Fargason Co. v. Ball* (1913) 128 Tenn. 137, 159 S. W. 221. Apparently the Tennessee court applies the rule of non-liability to innocent agents generally. In Kentucky it is limited, apparently, to agents who are under a duty to serve the public without discrimination. *Abernathy v. Wheeler* (1890) 13 Ky. L. Rep. 713, 17 S. W. 858.

[13] *Supra,* note 3.

to bearer, will also lead us to exempt the innocent selling agent from liability; but that can be determined only by examining into those considerations of policy—a thing which the Massachusetts court failed to do. Note the problem: By the law governing negotiable instruments, in order that commercial paper may perform its functions, a thief is given a legal *power* but no legal *privilege*[14] to confer an indefeasible ownership of the instruments upon a holder in due course. By virtue of this power the thief can confer upon his agent—the innocent banker of the principal case—a power to do the same. Does the innocent agent acquire a legal privilege as well as a power? Or is he under a duty to refrain from selling, even innocently, the instruments, so that if he does he will be liable to the true owner in damages? The statement of the Massachusetts court as to the protection given the holder in due course clearly involves the existence of the power, but obviously it tells us nothing as to the privilege. We may, however, conclude that negotiable paper payable to bearer will not be dealt with as freely as we wish it to be unless we extend protection to the innocent agent as well as to the holder in due course; if so, we shall protect the former as well as the latter—and this probably is what the Massachusetts court had in mind.

If we adopt the Massachusetts view, we have the following interesting but perhaps justifiable consequences. Where the acts of the innocent agent result in divesting the owner of personal property of all claim to the property sold, there is no conversion by agent or purchaser, and the former owner is left with an action against one person only, *viz.*, the dishonest principal; where, as in the case of ordinary chattels, the innocent agent's acts leave the person whose property has been misappropriated with full title to his property, there is a conversion by the agent and the owner has his option to proceed against either: (1) the misappropriating principal; or (2) the innocent agent; or indeed (3) the purchaser. It may also be noted that the latter rule would apply to a promissory note which is not negotiable,[15] as well as to other non-negotiable instruments.[16] Apparently the former rule would apply to the sale by an innocent agent of

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[14] *Power* and *privilege* are here used in a technical sense, the former to signify that the person concerned by his acts *can* accomplish certain results; the latter to denote *absence of duty* on the part of the privileged person to refrain from accomplishing those results. Not being privileged to transfer title the thief is liable to the true owner if he exercises his power to do so.

[15] For example, to a purported sale and transfer by an innocent agent of a written promise to pay to bearer, which contains conditions so that the instrument is not negotiable.

[16] *Bercich v. Marye* (1874) 9 Nev. 312, in which a broker who innocently, as agent, sold stolen non-negotiable certificates of stock was held liable to the owner for conversion, although the latter had indorsed them in blank before the theft occurred. *Cf. Koch v. Branch* (1869) 44 Mo. 542.

an ordinary chattel under such circumstances that title passed to a *bona fide* purchaser for value.[17]

One cannot help believing that a reconsideration of the policy involved in this whole line of cases ought to be undertaken. When we recall the relatively slight protection given to ownership of chattels in some of the continental systems—title may in many cases be passed by one in possession without other title[18]—ought we not at least to ask ourselves whether we need to give owners of chattels actions not only against the misappropriating principal and the *bona fide* purchaser but also against an innocent agent? The latter assumes no dominion over the property for himself and often derives no profit. If one sympathizes with the view that the prevailing rule as to the innocent agent's liability in the case of ordinary chattels is of doubtful public policy, he will welcome the decision in the principal case as a refusal to extend the prevailing American doctrine beyond its present limits. In the somewhat analagous case of an innocent agent selling trust property for a trustee who is selling in breach of trust the law seems to be that the agent is not liable to the *cestui*.[19]

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RESCISSION FOR INNOCENT MISREPRESENTATION

In the Comment bearing the above title in a previous number of the JOURNAL[1] it was pointed out that American courts were developing the law relating to innocent misrepresentation along lines differing somewhat from those established in the English cases. This is empha-

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[17] For example, a sale in market overt; or by the agent of a factor under some of the statutes giving factors entrusted with the possession of goods for sale a power to invest a *bona fide* purchaser for value with full title. The question might also arise where the agent transfers or attempts to transfer by means of a warehouse receipt, never dealing with the physical goods. In some cases title might pass; in others not. Would the liability of the agent to pay damages depend upon that? Here must be noted the suggestion that the innocent selling agent is never liable for conversion where he deals not with the physical goods but merely with warehouse receipts or the like. See *Leuthold v Fairchild* (1886) 35 Minn. 99, 27 N. W. 503, 28 N. W. 218.

[18] French Civil Code, sec. 2280; German Civil Code, secs. 929-936; Schuster, *Principles of the German Civil Law*, 390-399.

[19] See *Brinsden v. Williams* [1894] 3 Ch. 185; Godefroi, *Trusts* (4th ed.) 230. Of course there are differences between a thief of negotiable paper payable to bearer and a rascally trustee, but each possesses a power, recognized as valid by both equity and law, to defeat the claim of the owner or *cestui*, respectively, by a transfer to a *bona fide* purchaser for value. Each is under a duty in equity—the thief's duty is legal as well—to refrain from exercising that power. We may well ask, therefore, whether agents who act in good faith ought to be held to incur different liabilities in the two cases.

[1] (1918) 27 YALE LAW JOURNAL, 929.